

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1516-CR

Cir. Ct. No. 2014CF2134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAMON DONTÉ BEALIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Damon Donte Bealin appeals from a judgment of conviction for one count of first-degree reckless homicide as a party to a crime and one count of being a felon in possession of a firearm, contrary to WIS. STAT. §§ 940.02(1), 939.05, and 941.29(2) (2013-14).¹ He also appeals from an order denying his motion for postconviction relief, which sought a new trial on grounds of ineffective assistance of trial counsel. Bealin argues that he is entitled to an evidentiary hearing on his postconviction motion. We disagree and affirm the judgment and order.

BACKGROUND

¶2 The criminal charges in this case relate to the shooting death of Tycer Lee. Police officers discovered Lee's body lying in the street in the middle of the night. As police officers were conducting their investigation at the crime scene, M.D. approached an officer and said he witnessed the shooting.² M.D. ultimately spoke with investigators twice and indicated that he knew both the victim, Lee, and the shooter, Bealin. Bealin was later charged with first-degree reckless homicide and being a felon in possession of a firearm.

¶3 The case proceeded to trial, where M.D. testified about his familiarity with Bealin and Lee and the events he witnessed the night Lee was

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Throughout this decision, we have substituted the witness's initials for his name, including when quoting from transcripts and other documents.

shot.³ M.D. admitted that he was a regular drug user and said that he knew Bealin from his experience buying and using drugs at Bealin's home. M.D. said he and Lee had previously "h[u]ng out" and taken drugs together.

¶4 M.D. testified that on the night Lee was shot, M.D. was standing on the sidewalk, preparing to roll a cigar laced with marijuana and cocaine. M.D. encountered Lee walking down the street and indicated that he had procured some drugs. M.D. said that Lee responded, "[H]old on. I've got to do something." M.D. said Lee then walked down the street and, as he did so, M.D. saw a car pass by.

¶5 M.D. said he recognized the car, a "light yellow Ford" that Bealin "frequently" drives. M.D. said that he "heard some tires" that "caught [his] attention." He looked down the street and saw Lee and Bealin "in the street talking." M.D. testified that he was "positive" Bealin was the man he saw talking to Lee. M.D. said that he observed "a little commotion," and then, as he continued to roll his cigar, he heard a gunshot. M.D. said he ran and "ducked behind [a] car until the shots stopped." M.D. testified that he saw Bealin's car drive away, leaving Lee's body lying in the street.

¶6 M.D. said that he started to approach Lee's body but then concluded Lee was dead and decided to run home. M.D. characterized the rest of the night as "a blur" and said that he felt like he was "in shock." M.D. said he left his home and went to Bealin's house, where he consumed cocaine, alcohol, and marijuana

³ M.D. was a reluctant witness who had to be taken into custody to ensure his participation at the trial. The jury learned this early in his testimony when the State asked why he was in custody. We provide this summary of M.D.'s testimony and the testimony of two additional citizen witnesses as background. We do not discuss all of their testimony.

for about fifteen minutes. M.D. testified that there were multiple people at the house and that the atmosphere at the house was “tense.” M.D. said he saw Bealin at the house and that Bealin was “[j]ittery, whispering back and forth” and “looking out windows.”

¶7 M.D. testified that after he left Bealin’s house he “went a few places,” although he could not “remember exactly where [he] went” after leaving Bealin’s house.⁴ Eventually, he encountered a police officer in an alley who was assisting in the investigation of Lee’s death. M.D. indicated that he knew something about the shooting, so the officer called for assistance. M.D. spoke with a detective in a police car and then drove around the neighborhood with the detective, showing him where Bealin lived and pointing out Bealin’s car.

¶8 The State called two additional citizen witnesses to testify. One young woman testified that on the night Lee was shot, she was at Bealin’s house visiting her sister, who was Bealin’s girlfriend. She said she woke up when she heard Bealin “yelling and screaming” and telling everyone to “get up” and “get [their] stuff.” She said that she saw Bealin wipe off a gun with a white towel and pass the gun to another person. She testified that Bealin looked “afraid, scared.” She said the police were outside the house at that point, and when she and her sister left the house with Bealin, they were stopped by the police.

¶9 Another woman testified that she knew Bealin from visiting his home, which she called a “smoke house” or “crack house” where people consume drugs. She said she was a friend of Lee and that prior to Lee’s death, she heard

⁴ The detective testified that M.D. told him he went to Bealin’s house twice after the shooting and that he smoked crack cocaine both times.

Bealin say he was angry with Lee for stealing a large amount of crack cocaine from Bealin.

¶10 Bealin did not testify, and the defense did not call any witnesses. Bealin's defense, explained by trial counsel in his opening statement and closing argument, was that M.D. was mistaken about what he saw and that Bealin was not involved with Lee's death. The jury found Bealin guilty of both counts. He was sentenced to consecutive prison sentences totaling forty years of initial confinement and fifteen years of extended supervision.

¶11 Represented by new counsel, Bealin filed a postconviction motion alleging that trial counsel provided ineffective assistance. Bealin acknowledged that trial counsel impeached M.D.'s credibility by asking questions about his drug usage, his request that the detective give him money, and the fact that he had only a limited opportunity to see the shooting based on where he was standing and his preoccupation with his cigar. However, Bealin asserted that his trial counsel provided ineffective assistance by failing to impeach M.D. with two inconsistencies between his testimony and his statements to the detective.

¶12 The first inconsistency Bealin's motion identified concerned M.D.'s testimony that he spoke with Lee immediately prior to the shooting. The police report states that M.D. told the detective he last saw Lee the day prior to the shooting, and nothing in the police report indicates that M.D. spoke with Lee right before the shooting.

¶13 The second inconsistency Bealin's motion identified relates to M.D.'s testimony that he saw both Bealin and Lee standing outside Bealin's car. The police report indicates that M.D. said Lee was "by the driver's door of the yellow Ford" when he was talking with Bealin, and that after hearing a gunshot,

M.D. “heard 5 to 7 more shots coming from the auto.” Bealin argues that M.D.’s testimony that Bealin stood outside his car is inconsistent with M.D.’s statements to the detective.

¶14 In its written response to the motion, the State acknowledged the first inconsistency but argued that trial counsel was not deficient for failing to raise it and that in any event, the alleged deficiency was not prejudicial.

¶15 As to the second inconsistency, the State disputed Bealin’s assertion that M.D.’s statement to the detective definitively indicated that Bealin remained in his vehicle. The State explained:

While [the detective’s] report contains a specific description of where the victim was standing, it makes no mention of where the defendant was located. The fact that the victim was “by the driver’s door of the yellow Ford” does not mean that the defendant was inside the car—that is an assumption, void of support, that the defendant has made. [The] report contains no information from which one can determine where the defendant was located prior to the shooting. The defendant’s claim that M.D. “never told police that [Bealin] got out of the car” may be supported by the report, [but] ... the police report [also] support[s] the following claim, which would be consistent with M.D.’s trial testimony—“M.D. never told the police that the defendant did not get out of the car.” Simply put, there is no information in the report that identifies where the defendant was standing just prior to the shooting. All that can reasonably be said is that M.D.’s trial testimony, rather than being contrary to the information in the police report, provides more information than is contained in the police report. It cannot, therefore, reasonably be said ... that there is a difference between M.D.’s trial testimony and the information in the police report.

(Record citations, underlining, italics, and one comma omitted.)

¶16 The trial court denied the postconviction motion in a written order without holding an evidentiary hearing. As to the first inconsistency, the trial

court agreed with Bealin that M.D.'s testimony that he communicated with Lee just before the shooting contradicted his statement to the detective that the last time he saw Lee was the night before the shooting. However, the trial court concluded that trial counsel's failure to point out that inconsistency was not prejudicial. The trial court explained:

This court presided over the trial and recalls M.D.'s demeanor and testimony. Based on what the court heard and observed, there is not a reasonable probability that M.D.'s recollection of when he had last seen the victim would have had any bearing on the jury's verdict. If anything, his history of daily drug and alcohol use as relayed to the jurors would have impacted the verdict more than when he had last seen the victim, as well as his continual reference to his poor memory of the incident from the year before. Here, M.D. testified that he knew the defendant drove the car he saw prior to the shooting; that he saw the defendant driving it on the night of the shooting; that he knew the defendant previously, having gone over to his house to get drugs or do drugs; that he saw the defendant talking with Lee that night; that he heard a shot; and that he then saw the defendant drive off with Lee laying there in the street. He identified the defendant from a photo, and he stated he had no doubts at all about seeing the defendant with Lee just before Lee was shot. The witness was completely certain that the defendant was the person who had shot Lee and even if he had two versions about who was standing where at the time, there is not a reasonable probability that his identification of the defendant would have been placed in jeopardy because of that inconsistency. In sum, the court finds that trial counsel was not ineffective, and even if his failure to ask M.D. questions about an inconsistency of this nature can be deemed deficient performance, it did not prejudice the defendant's case. M.D. was positive about the shooter's identity and had seen the defendant and his car previously in the neighborhood.

(Record citations omitted; victim's last name substituted for his nickname.)

¶17 As to the second inconsistency, the trial court agreed with the State that the detective’s report did not indicate where M.D. said Bealin was standing and, therefore, there was no prior inconsistent statement. This appeal follows.

DISCUSSION

¶18 This appeal concerns Bealin’s allegation that his trial counsel provided ineffective assistance by failing to point out two inconsistencies. To prove ineffective assistance, a defendant must show that his trial counsel’s performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a court need not address the other. *Id.* at 697. “To prove constitutional deficiency, the defendant must establish that counsel’s conduct falls below an objective standard of reasonableness.” *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. “To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citations and internal quotation marks omitted).

¶19 An evidentiary hearing preserving the testimony of trial counsel is “a prerequisite to a claim of ineffective representation on appeal.” *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, “[a] hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges such facts is a question of law. *See id.*, ¶9. A motion for a *Machner*

hearing may, at the discretion of the trial court, be denied “‘if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.’” *State v. Roberson*, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted).

¶20 With those standards in mind, we begin with the parties’ disagreement over whether the police reports indicate that M.D. told the detective Bealin remained inside the car. Like the trial court, we are skeptical that statements in the police report that M.D. saw Lee “by the driver’s door” and heard gunshots “coming from the auto” establish that Bealin remained in the vehicle. However, even if we accept for purposes of this appeal both of Bealin’s assertions about the inconsistencies between M.D.’s testimony and his statements to the detective, we conclude that he has not shown he was prejudiced by trial counsel’s failure to ask M.D. about those inconsistencies.

¶21 Specifically, we are not persuaded that Bealin’s motion demonstrated a reasonable probability that if M.D. had been asked about those inconsistencies, the result of the proceeding would have been different. *See Love*, 284 Wis. 2d 111, ¶30. Bealin’s postconviction motion fails for two reasons. First, his argument concerning prejudice is conclusory. The postconviction motion asserted that trial counsel’s “omissions prejudiced Mr. Bealin’s defense,” but the only argument concerning prejudice was the following:

M.D. was the sole eyewitness to the shooting. The case was bound to turn on his credibility. The discrepancies in his account to police and his testimony were crucial to the jury’s evaluation of his reliability and trustworthiness. Trial counsel’s failure to confront and impeach M.D. with these discrepancies was not a reasonable choice. It impaired the reliability of the verdict. Trial counsel was ineffective.

The fact that M.D. was the only eyewitness does not automatically establish that trial counsel's failure to impeach him with two inconsistencies was constitutionally prejudicial. Bealin's postconviction argument on prejudice was conclusory and insufficient. *See Roberson*, 292 Wis. 2d 280, ¶43.

¶22 Bealin provided an additional argument in his trial court reply brief, asserting that the inconsistencies “draw into question M.D.’s ability to accurately recall and relate what occurred in the moments of the incident.” He continued: “Impeachment based on these differing accounts directly attacks the basis for the witness’[s] inculpatory story, and thus differs in quality from character impeachment based on a witness’[s] drug use, desire for payment or prior convictions.” These arguments are also conclusory and do not provide a basis for relief. *See id.*

¶23 The second reason Bealin's prejudice argument fails is that ““the record conclusively demonstrates that [Bealin] is not entitled to relief.”” *See id.* (citation and emphasis omitted). Whether M.D. communicated with Lee the day of the shooting and whether Bealin stepped out of the car are not determinative facts in this case. For instance, there was no evidence presented that there was more than one person in the car or that someone other than the driver pulled the trigger. The inconsistencies are relevant only to the extent they could have given the jury cause to doubt M.D.’s truthfulness or his ability to see and remember the shooting.

¶24 The jury was given many reasons to doubt M.D.’s testimony: he was a regular drug user, he was preparing to use drugs at the time of the shooting, and he used drugs and alcohol after the shooting, which led him to forget where he went between the time he left Bealin's house and later encountered the police

officer. M.D. also acknowledged that he was not watching Lee and Bealin constantly during their interaction, as M.D. was preparing his marijuana and cocaine cigar. In addition, M.D. admitted that he asked the detective for money, and the detective acknowledged that he gave M.D. about five dollars. Trial counsel impeached M.D. with all of this information.

¶25 Despite hearing about M.D.’s impairment, faulty memory, and desire to be rewarded for his assistance, the jury was not persuaded by trial counsel’s attacks on M.D.’s “credibility” and “reliability.” Instead, it was able to rely on both direct and circumstantial evidence to find Bealin guilty. M.D. testified that he was “positive” that he saw Bealin argue with Lee just before the gunshots were fired, and he shared that information with police the night the shooting happened. The jury also heard testimony from M.D. and two women about Bealin’s behavior at the house after the shooting—behavior from which the jury could infer consciousness of guilt. In addition, one of the women provided a motive for Bealin’s anger with Lee: Lee’s alleged theft of Bealin’s drugs. We conclude that there is not a “reasonable probability” that if the jury had heard about the two inconsistencies it would have acquitted Bealin. *See Love*, 284 Wis. 2d 111, ¶30. In other words, our confidence in the outcome of the trial has not been undermined. *See id.*

¶26 Because Bealin’s postconviction motion relied on “conclusory allegations” and because the record “conclusively demonstrates” that Bealin was not prejudiced from trial counsel’s alleged deficiencies, the trial court did not erroneously exercise its discretion when it denied the postconviction motion without a hearing. *See Roberson*, 292 Wis. 2d 280, ¶43 (citation and emphasis omitted). Bealin is not entitled to relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT.
RULE 809.23(1)(b)5.

